

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 15, 2006

TO : Stephen M. Glasser, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Innovative Teaching Solutions
Case 7-CA-49061 177-1683-5000
220-7533-2500
260-6710
280-8200
280-8290
280-9410

The Region submitted this case for advice concerning whether a private company that operates a public charter school is an employer or an exempt political subdivision within the meaning of Section 2(2).¹

We conclude that the company is an exempt political subdivision because, under the second prong of the Hawkins County² test, the Employer is administered by individuals who are responsible to public officials. Accordingly, absent withdrawal, the Region should dismiss the charge for lack of jurisdiction.

FACTS

Old Redford Academy (ORA) is a Detroit, Michigan "public school academy," or charter school, that teaches elementary, middle, and high school students. ORA was established pursuant to Michigan's Revised School Code (the Code).³ Under the Code, ORA constitutes a public school and a governmental agency. As such, ORA is subject to various state statutes, including Michigan's freedom of information act.

Pursuant to the Code, ORA received its charter from Central Michigan University (CMU), a public university with

¹ The Region does not seek advice on the merits of the charge, which alleges that the company disciplined and discharged five employees in violation of Section 8(a)(3).

² NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600 (1971).

³ Mich. Comp. Laws. §§380.501, et seq.

an elected governing board.⁴ CMU establishes the number, selection criteria, and term length of ORA's board of directors, whose initial and subsequent appointees CMU must approve. CMU may also remove any ORA director and must approve any change to ORA's bylaws or articles of incorporation. CMU retains authority to ensure that ORA complies with its charter and applicable law, and may revoke ORA's charter at any time should ORA fail to abide the various provisions governing its operation.

Public school academies like ORA are largely funded by state school aid payments pursuant to Michigan's State School Aid Act of 1979. CMU serves as ORA's fiscal agent and receives these funds on ORA's behalf. ORA may also accept federal funds, donations, and special-programs assessments, but it may not charge tuition.

Under the Code, a public school academy may directly employ its own staff, or alternatively may contract that responsibility to an "educational service provider." The authorizing public body that had granted the public school charter must approve the contract with the service provider, which also must comply with the authorizing public body's policies. In 1999, ORA contracted with Innovative Teaching Solutions (ITS), a private, for-profit Michigan corporation, to be ORA's educational service provider. ITS' sole director is CEO Melvin Smith. As ORA's service provider, ITS employs a Director of Instruction, three principals, and roughly 60 teachers.

ORA's relationship with ITS is set forth in a Management Agreement. The Management Agreement provides that, subject to ORA's charter, policies, and budget, ITS retains sole authority to determine staffing needs. Additionally, subject to applicable state and federal law and consistent with ORA's "educational program," ITS can select, evaluate, assign, discipline, and transfer personnel.

ITS must submit an annual budget to ORA at least 60 days before ORA is required to forward an approved budget to CMU. At each regularly scheduled ORA board meeting, ITS must provide ORA with a specific comparison of ORA's budgeted items versus its actual revenues and expenditures, and explain any discrepancies. ITS must also provide ORA's board, on request, with detailed monthly statements of all direct expenditures for services rendered on ORA's behalf, monthly cost statements, and quarterly financial reports,

⁴ It is undisputed that both ORA and CMU are state governmental entities.

each of which ITS must make available to ORA's auditors. Additionally, ITS must provide operations and student performance reports to ORA, CMU, or the State of Michigan no fewer than four times per year.

ORA establishes student recruitment, admissions, and disciplinary policies, and ITS may not enact any policy, rule, regulation, procedure, curriculum, or budget without ORA's approval. ITS may not alter the educational program without approval from ORA and/or CMU. ITS cannot subcontract any of the educational services it provides without ORA's express approval. Records that ITS generates on ORA's behalf constitute ORA's property and public records under Michigan's freedom of information act.

The Management Agreement further requires that ITS "consult" with ORA prior to hiring a principal.⁵ Additionally, ORA may direct ITS to remove a principal at any time should ORA's board become dissatisfied with her or his performance, and ORA may direct ITS to remove a principal or teacher for unsatisfactory performance at the end of a fiscal year.

ORA may terminate the Management Agreement should ITS fail to account for expenditures; fail to follow any ORA policy, rule, regulation, procedure, curriculum, or budget; or fail to abide and meet the charter's educational goals. ORA may also terminate ITS' contract if ITS employs teachers in violation of the Management Agreement or applicable law,⁶ or if ITS action or inaction causes ORA to breach its charter.

ACTION

We conclude that ITS qualifies as an exempt political subdivision under the second prong of the Hawkins County test concerning entities administered by individuals who are responsible to public officials, because ORA exercises substantial control over ITS' employees, budget and operational policies.⁷

⁵ It is unclear what such a consultation entails.

⁶ For example, ITS teachers must hold valid Michigan teaching certificates and undergo criminal and background checks.

⁷ See Rosenberg Library Ass'n, 269 NLRB 1173, 1175 (1984) (finding library exempt under the second prong of Hawkins County because public officials ultimately controlled the library's budgetary and operational policies). In light of this disposition, we do not address the policy

In Management Training Corp.,⁸ the Board announced that in deciding whether to assert jurisdiction, it would consider only whether the subject entity meets Section 2(2)'s definition of "employer" and satisfies the applicable monetary jurisdictional standard. Section 2(2) excludes "any state or political subdivision thereof" from the definition of "employer." The Supreme Court in Hawkins County approved the Board's definition limiting the political subdivision exemption to entities that are either (i) created by the state, so as to constitute departments or administrative arms of the government, or (ii) administered by individuals who are responsible to public officials or to the general electorate.⁹ The Court stressed that the Board should examine an entity's actual operations and characteristics when assessing its Section 2(2) status.¹⁰

First, we note that as a private, for-profit corporation, as opposed to a state-created entity, ITS is plainly not exempt from the Board's jurisdiction under the first prong of Hawkins County. Our analysis is therefore confined to whether ITS falls under the second Hawkins County prong.

Under the latter Hawkins County exemption, the Board examines various factors bearing on an entity's relation to the state. The Board considers whether the individuals who administer the entity in question are appointed or subject to removal by public officials.¹¹ The Board also considers

considerations the Region raised as alternative grounds for not asserting jurisdiction over ITS.

⁸ 317 NLRB 1355, 1358 (1995), reconsideration denied 320 NLRB 131 (1995), overruling Res-Care, Inc., 280 NLRB 670 (1986).

⁹ 402 U.S. at 604-605.

¹⁰ Id. at 604, adopting NLRB v. Randolph Electric Membership Corp., 343 F.2d 60, 62-63 (4th Cir. 1965), as correct law.

¹¹ See, e.g., Regional Medical Center at Memphis, 343 NLRB No. 48, slip op. at 14 (2004) (no jurisdiction under second Hawkins County prong where, inter alia, employer was administered by publicly appointed and removable officials); and Oklahoma Zoological Trust, 325 NLRB 171, 172 (1997) (same). Cf. Research Foundation of the City Univ. of NY, 337 NLRB 965, 969-970 (2002) (Board asserted jurisdiction where none of employer's board members was appointed or subject to removal by public officials).

whether the employer is publicly or privately funded;¹² whether its budget is subject to approval by any public actor or agency;¹³ whether its expenditures are subject to any public financial reporting or auditing strictures;¹⁴ whether it carries out day-to-day management responsibilities free from or subject to oversight;¹⁵ and

¹² See, e.g., Regional Medical Center, slip op. at 15 (employer's budget was derived from tax revenue); and Rosenberg Library, 269 NLRB at 1175 (same). Cf. Research Foundation, 337 NLRB at 966, 970 (employer received no direct tax-levy funds); and Cape Girardeau Care Center, 278 NLRB 1018, 1019 n.5 (1986) (jurisdiction asserted over employer that, inter alia, received no funding or other support from county).

¹³ See Regional Medical Center, slip op. at 15 (employer's annual budget subject to county approval); and Rosenberg Library, 269 NLRB at 1175 (employer required to prepare and submit annual line-item budget requests to county judge and county commissioners for action and approval). Cf. Research Foundation, 337 NLRB at 970 (employer not responsible to City University, State of New York, or any other government entity concerning its budget); St. Paul Ramsey Medical Center, 291 NLRB 755, 756 (1988) (finding jurisdiction over employer that was granted authority and "all necessary power" to prepare its annual budget); and Cape Girardeau, 278 NLRB at 1019 n.5 (employer set its own fee schedule and budget, neither of which it was required to submit to county).

¹⁴ See, e.g., Regional Medical Center, slip op. at 15 (employer required to undergo public audit and file annual financial report with county); Oklahoma Zoological Trust, 325 NLRB at 172 (employer accountable to city council regarding its expenditures); and Rosenberg Library, 269 NLRB at 1175 (requirement that employer submit to post-expenditure audits and to line item budget requests for funding beyond initial level showed employer was answerable to city for its expenditures and, therefore, its policies). Cf. Research Foundation, 337 NLRB at 970 (although employer agreed to submit a financial report to City University and to New York's state budget director, and to provide copies of other financial reports and audits to government entities, Board found no evidence that employer was responsible to any government entity concerning budgetary matters).

¹⁵ See, e.g., Rosenberg Library, 278 NLRB at 1175 (finding employer was administered subject to public control of its operational policies). Cf. Research Foundation, 337 NLRB at 970 (employer officials who implemented daily operations

whether it is governed by public record or open meeting requirements.¹⁶

Initially, we recognize that compared to Regional Medical Center or Oklahoma Zoological Trust, ORA retains relatively circumscribed appointment and removal powers over ITS officials. Unlike in those cases, ITS has no board, and ORA does not control the appointment or removal of its sole director/CEO or its Director of Instruction. However, the Management Agreement does vest ORA with complete authority to dismiss ITS' principals and teachers, strongly indicating that ITS officials are directly accountable to ORA in their hiring and supervisory decisionmaking.¹⁷ In view of this evidence, together with the numerous indicia of ORA's budgetary and operational control over ITS set forth below,¹⁸ we conclude that ITS is an exempt political subdivision under the second prong of Hawkins County.

First, ITS is largely funded through tax dollars from Michigan's State School Aid Act of 1979 and cannot charge tuition. ITS must also submit its budget to ORA and CMU for approval. ORA establishes student recruitment, admissions, and disciplinary policies. Although ITS can manage and direct its staff, it does so subject to considerable ORA oversight. Thus, ITS must abide by all ORA policies, rules, regulations, procedures, curricula, and budgets unless it obtains ORA's approval to do otherwise. Furthermore, ITS may not subcontract any educational service it provides on ORA's behalf without ORA's prior approval, and ITS' records constitute ORA's property and public records under Michigan law.

answerable only to employer's board and not to City University or any other government agency); and Cape Girardeau, 278 NLRB at 1019-1020 (no evidence that any of employer's board members had any "direct personal accountability" to public officials or the general public).

¹⁶ See, e.g., Regional Medical Center, slip op. at 15 (employer's board meetings subject to state open meetings law); and Oklahoma Zoological Trust, 325 NLRB at 172 (employer's meetings required to be public, and its records and minutes made available for public inspection).

¹⁷ Cf. Cape Girardeau, above at n.16. In this regard, we place little reliance on the Management Agreement's provision that ITS "consult" with ORA prior to hiring a principal, because it is unclear what this requirement in fact embodies.

¹⁸ See Rosenberg Library Ass'n, above.

To ensure compliance with these budgetary and operational restrictions, ITS must satisfy strict ORA reporting requirements. For example, at each regularly scheduled ORA board meeting, ITS must provide ORA with reports detailing revenues and expenditures, reconciling any discrepancies. Furthermore, on demand, ITS must provide ORA with detailed monthly statements regarding all expenditures made on ORA's behalf, as well as monthly cost statements, and quarterly financial reports, all of which are subject to ORA audits. ITS must also provide ORA, CMU, or the State of Michigan with operations and student performance reports at least four times a year. And, significantly, ORA can terminate the ITS' contract should ITS fail to implement any ORA policy, rule, regulation, procedure, curriculum, or budget; or fail to honor and fulfill the charter's educational goals. ORA can also terminate ITS' contract if ITS employs teachers in breach of the Management Agreement or applicable law, or if ITS action or inaction causes ORA to violate its charter.

In sum, ORA not only has substantial control over ITS' policies regarding employees, budget, and operations, it has substantial reporting requirements designed to effectuate that control. Accordingly, we conclude that ITS' actual operations and characteristics¹⁹ amply demonstrate that it is administered by individuals responsible to public officials at ORA. ITS is thus an exempt political subdivision, and the Region should dismiss the charge, absent withdrawal, for lack of jurisdiction.

B.J.K.

¹⁹ See Hawkins County, 402 U.S. at 604.